Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1265

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1985

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

ASKIA KHALIL SHABAZ
Respondent

ON WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

JOINT APPENDIX

WAYNE COUNTY PROSECUTOR'S OFFICE
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PETITION FOR CERTIORARI FILED JANUARY 21, 1986
CERTIORARI GRANTED MARCH 31, 1986

5-7-86

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DOCKET ENTRIES

1982

July 10 Complaint and warrant filed, defendant arraigned on the warrant.

July 22 Preliminary examination held; defendant bound over for trial.

July 22 Waiver of arraignment on the information filed.

Sept. 3 Motion to Quash the Information or in the alternative for an Evidentiary Hearing to Suppress the Evidence. Hearing rescheduled for October 8, 1982.

Oct. 8 Order suppressing evidence, quashing information and dismissing case filed.

Nov. 24 Claim of Appeal filed.

Dec. 20 Appellant's Brief, and Motion to Extend Time filed.

1983

Jan. 25 Defendant-Appellee's Brief on Appeal filed.

Jan. 27 Case noticed for submission.

June 7 Case submitted; oral argument.

Aug. 12 Opinion affirming trial judge released by Court of Appeals

Sept.16 Delayed Application for Leave to Appeal filed.

Oct. 19 Answer in Opposition to Delayed Application for Leave to Appeal filed.

DOCKET ENTRIES

1984	
Feb. 28	Order granting Application for Leave to Appeal granted by Michigan Supreme Court.
May 14	Appellant's Brief on Appeal filed.
Aug. 24	Motion to dismiss by Defendant-Appellee denied by Order of Michigan Supreme Court.
Oct. 7	Appellee's Brief on Appeal filed.
1985	
July 15	Motion for Leave to file a Supplemental Brief by Plaintiff-Appellant denied by Order of Michigan Supreme Court.
Dec. 4	Opinion affirming Court of Appeals released by the Michigan Supreme Court.

PRELIMINARY EXAMINATION TRANSCRIPT

STATE OF MICHIGAN
IN THE 36TH DISTRICT COURT
OF THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN

VS

ASKIA KHALIL SHABAZZ,

Defendant

DISTRICT COURT FILE NO. 82-63440
RECORDER'S COURT FILE NO. 82-04424

BEFORE THE HON. LOUIS F. SIMMONS, JR.,

JUDGE, Detroit, Michigan, Thursday,

July 22, 1982

APPEARANCES:

MR. MICHAEL LEHTO, Assistant Prosecuting Attorney On behalf of the People

MR. THOMAS E. BETZ, Attorney at Law
On behalf of the Defendant.

Donna K. Sherman, CSR 2691
Official Court Reporter

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PRELIMINARY EXAMINATION TRANSCRIPT

(3) Detroit, Michigan
Thursday, July 22, 1982

PROCEEDINGS

THE CLERK: Case No. 82-63440, People of the State of Michigan versus Askia Khalil Shabazz. Charge is carrying a concealed weapon, pistol on person.

MR. BETZ: Thomas Betz appearing on behalf of Askia Khalil Shabazz, we move for the sequestration of all witnesses.

KENNETH SURMA,

was called as a witness herein, and after having been first duly sworn to testify to the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEHTO:

Q. Tell us your name and occupation.

PRELIMINARY EXAMINATION TRANSCRIPT

A. Kenneth Surma, Detroit Police Officer.

Q. Were you working as a police officer on July 10, 1982 at about 9:15 p.m.?

A. I was, sir.

Q. On that date and time were you near 9037 Woodward in the City of Detroit?

A. I was.

Q. What were you doing in the area?

A. We were in the area of Woodward, Claremont area checking (4) for narcotic activity working plain-clothes, unmarked car.

Q. Were you in your car when you saw someone exit a building with a paper bag?

A. Yes, I did.

Q. What happened at that time?

A. My partner, Officer Skotski, was driving the scout car westbound on Claremont from Woodward. We observed the defendant sitting at counsel's table in the grayish shirt and gray

slacks exit 60 Claremont, which is a known narcotics pad.

MR. BETZ: Objection, your Honor, hearsay as to whether it's a known narcotics pad or not.

THE COURT: Sustained.

MR. LEHTO: Indicating for the record the witness has identified the defendant, Askia Shabazz.

Q. (By Mr. Lehto) Now, what happened as the defendant exited this building.

A. He had looked in our direction and started stuffing a paper bag, like, under his vest. As we were slowing down, he looked in our direction again and immediately started running east on Claremont to Woodward. I pursued the subject, and he ran to 9037 Woodward, which is a stairway to an apartment building, and threw the paper bag in the corner there. As he

was coming out of the doorway, I was standing there. He tried to push his way back away from me. (5) I grabbed him, and my partner, Officer Hayes, subdued him and retrieved the bag, which contained a .357 Magnum.

Q. What did you do with the gun?

A. I confiscated it, unloaded it, asked him if he had a permit. He stated, no, and I placed him under arrest for CCW.

Q. Would you describe the gun more specifically?

A. It was a Smith & Wesson four inch blue steel revolver, .357.

Q. How long had you been working in this area?

A. Approximately, 11 years.

Q. What's your familiarity with this particular building that the defendant was at when he came out?

A. We had complaints --

MR. BETZ: Objection, which building, there are two buildings involved here.

Q. (By Mr. Lehto) There was a building that this defendant came out of?

A. 60 Claremont.

Q. That building, what's your familiarity with that building?

A. We've had complaints on it on narcotics activities. We've made other arrests in that area for narcotics and concealed weapons.

Q. Does anybody live at that building? What kind of building is it?

(6)

A. It's an old apartment building.

Q. Is it vacant or occupied?

A. It's an occupied dwelling.

MR. LEHTO: Your witness.

PRELIMINARY EXAMINATION TRANSCRIPT

CROSS EXAMINATION

BY MR. BETZ:

Q. This building on 60 Claremont, how many stories high is it?

A. I believe it's four.

Q. Do you have any idea how many dwelling units there are in this building?

A. Not offhand exactly, no, sir.

Q. You said, "We have made a number of arrests there for carrying concealed weapons and narcotics." Does that mean you personally or the Detroit Police Department?

A. Myself and my partner, when I said we.

Q. About how many arrests have you made?

A. I've made, approximately, five, six CCW arrests, about 10 narcotics arrests there.

Q. You saw this individual allegedly going out of 60 Claremont. Describe what he was wearing?

A. It was a vest similar to that one -- I

believe it was brown -- blue jeans and I don't remember what color shirt.

Q. What time of the evening was this?

A. Around nine o'clock, I believe.

Q. Was it dark out at this point?

(7)

A. It was still light. It would be dusk out.

Q. First of all, where were you parked at the time?

A. We weren't parked. We were driving. We were coming from Woodward toward what would have been Webb, on Woodward toward Claremont.

Q. You're familiar with the area. Is this the building that's right next to the King Cole Supermarket?

A. Correct.

Q. You saw this individual come out of the building. What did he do?

A. He looked in our direction and

immediately started stuffing the bag in his pants.

Q. You said you were in plainclothes. Was this a marked scout car?

A. Unmarked standard police detective car.

Q. There would be no indicia that it was a police car?

A. Correct.

Q. He looked in your direction; what did he do?

A. He started stuffing the bag between himself and his pants.

Q. Then, what did you do?

A. We started slowing down to take a better look at what he was doing. As we were coming to a stop, he immediately started to run.

Q. You proceeded after him on foot or in the car?

A. My partner backed up, and I got out of the car and chased (8) him on foot.

Q. How far did you chase him?

A. Approximately, three store fronts.

Q. Then, he entered a building?

A. Correct.

Q. What's the address of the building he entered?

A. I believe it's 9037 Woodward.

Q. What type of building is this?

A. It appeared to me to be a stairway going up to an apartment type building.

Q. Is this an outside stairway or inside stairway?

A. It would be inside of the building. You had one door which was opened. Then, you had a second doorway.

Q. How far did he get into this building?

A. It would be the second doorway. It would be five to ten feet from the front door.

Q. You were pursuing him the whole time?

A. Correct.

PRELIMINARY EXAMINATION TRANSCRIPT

Q. Were these glass doors or wooden doors?

A. They were glass doors.

Q. At some point, this individual ran back out of this building? What did you do at that point?

A. I grabbed him.

Q. And you subdued him?

A. I grabbed him and threw him to my other partner, who subdued (9) him.

Q. What's the name of your other partner?

A. Hayes.

Q. While your partner was subduing him, what were you doing?

A. I went around and retrieved the bag.

Q. Where was the bag?

A. Right by the second door.

Q. In front of the second door or beside the second door?

A. The door was, like, open. It was right in front of it in the corner of it.

PRELIMINARY EXAMINATION TRANSCRIPT

Q. At any time did you pull your service revolver?

A. I didn't, no.

Q. Did any other officer?

A. Officer Hayes did.

Q. Did he shoot him?

A. He ran into the defendant. They collided, and it went off.

Q. Did it strike the defendant?

A. No, it didn't.

MR. BETZ: I have no further questions, your Honor.

THE COURT: Mr. Lehto?

THE COURT: You may be excused. Thank you, Officer.

(Witness excused.)

(10) MR. LEHTO: The People move to bind over as charged.

THE COURT: Argument?

MR. BETZ: I would object to the bind over. There was no probable cause for the initial focus

by the police officers. First of all, he's not a competent witness to establish that 60 Claremont is a dope pad, but even assuming innuendo, it's a large building. There's a number of units. He's coming out of the building with a paper sack. He puts the paper sack, allegedly, under his vest. He has no reason to be in fear or feel that he's being pursued at this point, because it's an unmarked police car. These are non-uniformed officers, so he has no idea.

I think it smells of some post hoc creation of probable cause here. Clearly, under Brinnager versus United States, you need articulable basis for the initial focus. A paper bag in unlike a heroin coin envelope or something that is visibly dangerous. This is an innocuous paper bag. In Henry versus United States,

which involved boxes in a very, very similar situation where a person went into an alley to pick up boxes which had contraband in them, the Supreme Court said the subsequent pursuit was illegal. A box, in and of itself, is insufficient to give rise to probable cause for an (11) arrest. What we have here is a paper bag. We're right near King Cole's Grocery Market. Any number of people would have paper bags. Any number of people in that apartment building that he was exiting would have paper bags from going grocery shopping, any number of reasons an individual would have this. There's any number of reasons the person would place the paper bag under his vest. There's no res gestae here. It's irrational to assume that the individual knew he was being pursued when it's an unmarked car. They're

not uniformed police officers.

Also, under People versus Tally, I question the credibility here. I think it's a clear case of post hoc probable cause, rationalizing their subsequent actions after pursuing this person on a chimeral suspicion.

MR. LEHTO: Well, your Honor, not everybody who has a paper bag tried to stuff it in their pants and tries to run away from people when they look at them. The officer did have a reasonable suspicion to at least stop the defendant at this point, and he continued to flee. Before he was even stopped, he discarded the bag. There's no search and seizure. It's just a situation that would justify a stop by a police officer and a pat down, which they didn't even get to that point. I

don't (12) believe there's a search and seizure issue here, your Honor.

MR. BETZ: May I respond? The question isn't search and seizure. The question is probable cause for an arrest. There's no evidence here that the officer ever yelled, "Stop, we want to investigate," or anything. He just took off chasing him based on the fact that the paper bag was placed in a vest. That's not probable cause under United States versus Henry or Brinnager for an arrest.

MR. LEHTO: You don't need probable cause to stop someone.

MR. BETZ: That's not the standard the U.S. Supreme Court has set.

THE COURT: The Court does find there's a question of fact and does bind the defendant over as

charged, carrying a concealed weapon on person. The arraignment will be August 5th, 1982. Bond will be continued.

MR. BETZ: Thank you, your Honor.

(Hearing concluded)

(13)

STATE OF MICHIGAN)
COUNTY OF WAYNE)SS

I, Donna K. Sherman, Official Court Reporter, of the 36th District Court do hereby certify that the foregoing pages, 1 through 12, comprise a true, full and correct transcript of the preliminary examination taken in the matter of PEOPLE VERSUS ASKIA KHALIL SHABAZZ, Case No. 82-63440 (District), 82-04424, (Recorder's), on Thursday, July 22, 1982, before the Honorable Louis F. Simmons, Jr.

/s/
Donna K. Sherman, CSR-2691
Official Court Reporter

August 19, 1982

EVIDENTIARY HEARING TRANSCRIPT

STATE OF MICHIGAN
IN THE RECORDER'S COURT
OF THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN

VS

ASKIA KHALIL SHABAZZ,

Defendant

RECORDER'S COURT FILE NO. 82-04424

Proceedings had and testimony taken before the HONORABLE MICHAEL F. SAPALA, one of the Judges of the Recorder's Court of the City of Detroit on Friday, October 8, 1982, at about 11:35 a.m.

APPEARANCES:

MR. CHARLES KELLETT,
Assistant Prosecuting Attorney
On behalf of the People

MR. GERALD M. LORENCE, Attorney at Law
On behalf of the Defendant.

Carol A. Shell, CSR, RPR
Official Court Reporter
R-2387

EVIDENTIARY HEARING TRANSCRIPT

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EVIDENTIARY HEARING TRANSCRIPT

(3) Detroit, Michigan
Friday, October 8, 1982
11:35 a.m.

PROCEEDINGS

THE CLERK: File Number 82-04424, PEOPLE VS. ASKIA SHABAZ, charged with Carrying a concealed Weapon.

THE COURT: Gentlemen, appearances for the record?

MR. LORENCE: For the record, your Honor, Gerald M. Lorence representing Mr. Askia K. Shabaz.

MR. KELLETT: Charles Kellett, on behalf of the State of Michigan, your Honor.

THE COURT: Gentlemen, we are here today for an Evidentiary Hearing to determine the legality of the seizure and/or search of an item of evidence. I suppose we have the

officer here to testify?

MR. KELLETT: Yes, Officer Surma's here. I understand that was the witness that Mr. Lorence wanted for this hearing.

THE COURT: Officer Surma, come up and be sworn.

MR. LORENCE: If I may interject, while Officer Surma is taking the stand, I brought a motion on (4) behalf of my client to quash the Information or, in the alternative, to conduct an evidentiary hearing to suppress the evidence. Now, the Court is well aware that there was a preliminary examination that was held in this matter. And, on the basis of that preliminary examination, I filed this motion with the brief, basing my allegations, and asking the Court to consider the motion to quash the Information based

on the testimony already. When I appeared for the first time that I filed this motion for the date that it was originally set, I believe it was September the 17th, the prosecutor, who was not Mr. Kellett at that particular time -- I think it was Mr. Michael Cusick -- requested an adjournment for the purposes of calling this police officer.

Now, I have no further questions of this police officer but would rely on the record. And the only reason that I am here is because the prosecutor has requested that he be present, that is, Police Officer Surma.

MR. KELLETT: Well, if I may respond, your Honor, it's my understanding counsel's allegation is something involving the credibility of the testimony that was presented at a

preliminary examination before Judge Simmons of the 36th District Court, and, as I understand the law, it has changed recently. I'm sure the Court's aware that (5) prior times the Court could read testimony and determine whether it believed the testimony that it saw in front of it in print and since then, I should say recently, within the last two years, there's -- the Supreme Court has indicated very definitely a strong disapproval of that practice because the Court is asked to substitute its evaluation of credibility without benefit of having seen the witness appear before him. And I think that's the reason why Mr. Cusick asked to have Officer Surma produced, in order to have the Court observe his demeanor and listen to his answers in regard to the alleged improper search that led

to the seizure, I believe, of the evidence that Mr. Lorence wants to have suppressed.

THE COURT: I believe Mr. Kellett is correct. Additionally, the motion is entitled Motion to Quash the Information or, in the alternative, to conduct an evidentiary hearing to suppress the evidence, which leads me to believe, obviously, Mr. Lorence was well aware of the law at the time, in terms of People v. Talley.

I think the hearing is required, so let's examine the witness.

(6)

K E N N E T H S U R M A,

called as a witness herein, after having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EVIDENTIARY HEARING TRANSCRIPT

DIRECT EXAMINATION

BY MR. LORENCE:

Q. Would you please state your name for the record, sir?

A. Kenneth Surma.

Q. On the evening of July the 22nd, 1982, were you employed as a police officer in the City of Detroit?

A. I was.

Q. And were you in the vicinity of Woodward and Clairmont in the City of Detroit?

A. Yes, sir.

Q. Did you -- at that particular time were you in an unmarked scout car?

A. Yes, sir.

Q. And were you in plainclothes?

A. Yes.

Q. And you had a partner?

A. Yes.

Q. You were patrolling the area?

A. Yes, sir.

(7)

Q. And the area of Clairmont on Clairmont and -- near Woodward Avenue, did you observe Mr. Shabaz who is in this courtroom this morning?

A. Yes, I did.

Q. Had you had any reports of a felony having been committed with the description of Mr. Shabaz at the time that you observed him?

A. No, sir.

Q. Had you ever seen Mr. Shabaz before?

A. Not that I can recall.

Q. Now, you saw him exit the apartment, were you in your vehicle?

A. Yes.

Q. And how far away from him were you in your unmarked vehicle?

A. I would say approximately 50 feet or so.

Q. And was the car moving?

A. Yes.

Q. Was there traffic along Clairmont there?

A. Yes.

Q. Okay. And when he exited this apartment, you saw him come (8) out of the door?

A. Yes.

Q. And when he came out of the door of the apartment there's -- right there is the sidewalk that runs along Clairmont?

A. Yes.

Q. Now, at the preliminary examination you indicated he looked in your direction.

A. Correct.

Q. Now, when you say "direction," you're talking about the direction of your vehicle as you were proceeding along Clairmont Street?

A. Correct. We'd have been coming towards him.

Q. And you testified, also, that when he looked in your direction, he stuffed a paper bag under his vest.

A. Correct.

Q. Was he wearing any outer coat?

A. I don't believe so.

Q. But you did see a vest that he had on?

A. Correct.

Q. You don't recall him having any coat over a vest?

A. No, I don't.

Q. He had a vest. Did he have a shirt underneath that vest?

A. I believe so.

(9)

Q. And he was wearing a pair of trousers, obviously?

A. Correct.

Q. And you indicated that he had a paper bag.

A. Yes.

Q. Was this the kind of paper bag that

you would find people taking groceries out of supermarkets from?

A. yes, but it wasn't that large. It would be more of a lunch bag type size.

Q. But it was a brown paper bag.

A. Right.

Q. You indicated that on direct exam that he stuffed -- that he started stuffing the bag between -- strike that.

On direct examination, you testified that he looked in your direction and stuffed a paper bag under his vest?

A. Correct.

Q. Was he walking when he did this?

A. At that time, yes.

Q. And was he walking toward Woodward Avenue?

A. Yes.

Q. And your car was proceeding toward Woodward Avenue?

A. No. We were -- he would have been going eastbound on Clairmont. We were coming westbound.

Q. Oh, all right. So you had just either turned from or crossed Woodward Avenue, right?

A. Correct.

Q. And when he came out of 60 Clairmont, he turned toward Woodward Avenue and he was going toward Woodward while you were coming from Woodward?

A. Correct.

Q. Now, as he went toward Woodward, did you pass him and he pass you?

A. Yes.

Q. And was there a time after you had passed him that you either stopped your vehicle or got out of your vehicle?

A. Officer Scotsky, who was driving the car, started to slow down as we came up to him, you know, because he was

coming this way. We were going this way, he was slowing down, and just about to stopping. The Defendant took off running. Officer Scotsky put the car in reverse, went up to the corner in reverse, and I got out of the car and chased him.

Q. Now, when the Defendant started running, you didn't have any information that he had committed or was about to commit a felony had you?

A. No, I did not.

Q. You didn't see any weapons or any contraband in his hand at (11) that time, did you?

A. No.

Q. When Officer Scotsky stopped the car, was Mr. Shabaz past your car?

A. Yes, we would have been past each other by this time.

Q. Officer Scotsky didn't turn the vehicle around but just stopped it?

A. Correct.

Q. Who got out first, you or he?

A. I got out.

Q. And how far away was Mr. Shabaz running when you got out of the vehicle?

A. He would have been 10, 15 feet away from me.

Q. And he was running toward Woodward Avenue, right?

A. Correct.

Q. And you started running after him, right?

A. Correct.

Q. You didn't say, "Halt, please," did you?

A. No, I did not.

Q. Now, when Mr. Shabaz ran toward Woodward Avenue and got to Woodward Avenue, which direction did he turn?

A. He would have turned right, which would have been southbound.

Q. South? And right up at that corner there is a drugstore on (12) the corner?

A. Right on the corner, correct.

Q. So, he turned right at the drugstore and started running along Woodward Avenue southbound?

A. Correct.

Q. On the sidewalk?

A. Correct.

Q. There are stores and entranceways along Woodward Avenue there, past the drugstore; isn't that correct?

A. Correct. I believe there's a drugstore and a -- I believe it's a record shop and, I'm not sure if it's the doorway where he went in or another store front or not. It would be two or three different store fronts.

Q. All right. As you pursued Mr. Shabaz, you saw him go into one of the

doorways, right?

A. Correct.

Q. And that was the doorway not into a store but into, like, a vestibule that led to a stairway that went to the upstairs part of the store?

A. Correct.

Q. Now, when he did turn into one of the doorways, how far behind him were you?

A. When he turned in the doorway, I was maybe five, ten feet (13) away at this time, right in there.

Q. And you pursued him inside the doorway?

A. Correct. As he was coming out of the doorway, I was going in and this is where I had grabbed him and we had -- Officer Hayes was working with us -- there was three of us working, and I grabbed him. He tried to push away and I tossed him towards Officer Hayes, who grabbed him and I went into

the vestibule doorway and retrieved the bag.

Q. Now, when you grabbed him, you didn't have any additional information or sighting that he had committed a felony or was about to commit a felony, had you?

A. No, I did not.

Q. Now, read before a statement that you made on direct examination about first observing Mr. Shabaz and seeing him stuffing a paper bag under his vest. I want to show you just a question and answer, just read it to yourself, refresh your recollection, and this is on page 7 after your answer about stuffing it under his vest and ask if that refreshes your recollection.

A. Okay.

Q. Now, do you recall having been asked that question, also, you saw an individual come out of a building;

what did he do, do you recall that?

(14)

A. Saw stuff, right.

Q. And then your answer was he looked in our direction and immediately started stuffing the bag in his pants.

A. If I may clarify what I understand, the vest and then into the pants because I would assume I can't see completely under his vest when he started running. He wouldn't -- he wasn't holding it and if it was just under his vest it would have came out. So I -- what I would mean -- he put it under his vest and I would assume I should say he put it in the pants. If it was just in the vest it would fall out while he would have been running. I would assume so. This is what I am thinking now -- no, in my mind -- if you can understand that.

Q. Well, what you're going to say is

adding something additional to this.

A. No, I am trying to clarify in my mind, you says if the difference between under -- the vest is covering the pants. I can't say for sure it's in the pants or under the vest. I would assume it would be -- it would go under the vest and into the pants as he's running or else it would fall out if it's just under the vest.

Q. When Mr. Shabaz is running, did you see anything in his hand?

A. No.

Q. You said that Officer Hayes was the third officer that was (15) with you that particular night; is that correct?

A. Correct.

Q. And he was also in plainclothes?

A. That is correct.

Q. All of you were; isn't that correct?

A. Yes.

Q. It was you who physically stopped Mr. Shabaz?

A. At very first, yes.

Q. And while you were subduing him, was it one of the other officers who went in and retrieved the bag?

A. No, I went in and retrieved the bag.

Q. Now, all the time that you were pursuing Mr. Shabaz, even at the point where he went into that vestibule, you hadn't yelled or identified yourself as a police officer, did you?

A. Not at that time, no, sir.

Q. And you didn't at any time say, "Stop, in the name of the law," or, "Stop, I'm a police officer?"

A. No, sir.

Q. Now, when you went inside and retrieved the bags, were there two doors to go through?

A. If I can -- there's a front door then it's like a vestibule. I would say

maybe five, eight feet long, and there was another door that's there but it was open, you know; it wasn't closed.

(16)

Q. And you found a bag?

A. Yes.

Q. And where did you find the bag?

A. By the door that was open.

Q. It was a brown paper bag?

A. Yes.

Q. It was closed, wasn't it? It wasn't open?

A. The bag?

Q. Yes.

A. Yes.

Q. Yes, it was closed?

A. Right, right.

Q. 60 Clairmont, had you ever been in that building?

A. Yes, I have.

Q. How many, not tenants but apartments?

A. Roughly, at least 30.

Q. Thirty apartments.

A. I would say roughly, yeah, because there's at least three floors that I know of, so, approximately 10 rooms to a floor.

Q. So you say when you first observed Mr. Shabaz you saw him coming out of the apartment?

A. Correct.

Q. Does that apartment have an outer door and an inner door, also?

(17)

A. Yeah, there's a vestibule, I believe, and another door.

Q. Now, you didn't see him come through the inner door, did you?

A. No.

Q. So you didn't know whether he was in that apartment at all, did you?

A. No, I do not.

Q. And if he were in that apartment, you didn't know which apartment he was in?

A. No.

MR. LORENCE: I have nothing further.

THE COURT: Mr. Kellett, cross-examine.

MR. KELLETT: Just a couple questions.

CROSS-EXAMINATION

BY MR. KELLETT:

Q. Officer Surma, when you first saw Mr. Shabaz come out of the building that you describe, you said you saw him look in your direction.

A. Correct.

Q. And that as soon as he looked in your direction, he put a bag somewhere.

A. Correct.

Q. On his person, under his vest?

A. Underneath his vest area.

(18)

Q. All right. How long have you been a police officer?

A. Eleven years.

Q. What was in your mind, what do you believe was in your mind, Mr. Shabaz was doing at the time you saw him put that bag on his person when he, after he looked in your direction?

A. I believe he was hiding something.

Q. What; anything in particular?

A. I believed it to be either weapon or narcotics.

Q. Is that why you -- your partner -- stopped the vehicle that you were a passenger in?

A. Correct.

Q. And you said as soon as you came to a stop Mr. Shabaz then began to run.

A. Yes.

Q. You're assigned to 13th Precinct; is that correct?

A. Correct.

Q. And this intersection is at Woodward and Clairmont?

A. Yes.

Q. Is that a corner that, perhaps, one might expect to find a lot of narcotics or concealed weapons at?

A. Yes, we have -- there's problems of -- there's a lot of whores at that corner. Prostitutes, I should say.

THE COURT: Oh, I am sorry. I thought you (19) said horrors.

THE WITNESS: There're probably both which -- we've had a lot of complaints johns getting ripped off, narcotics and the building of 60 Clairmont we've had problems with.

Q. (Mr. Kellett, continuing) That's not in fact known as the Mount Royal Hotel?

A. No. It's just a memory.

MR. KELLETT: Nothing further.

THE COURT: Redirect.

REDIRECT EXAMINATION

BY MR. LORENCE:

Q. Mr. Kellett has asked you what is in your mind when you saw Mr. Shabaz and this bag. You didn't know for sure what was in this bag when you saw it; it wasn't opened, was it?

A. Not for sure, no.

Q. And you have never seen Mr. Shabaz before, have you?

A. No, I have not.

Q. Right across, or very close to this apartment, there's a supermarket; isn't there?

A. Yes.

Q. People normally bring things out of the supermarket in that same type of bag, too; don't they?

(20)

A. Yes.

Q. If somebody came out of that supermarket with even a smaller bag than the one that Mr. Shabaz had and put it underneath his coat or in his pants, would you stop him?

A. It all depends. It could have been supermarket holdup he -- if he started running, I would probably think.

Q. If Mr. Shabaz started running after your car past him?

A. As we started to stop.

Q. But you don't (know) the reason for him running, do you?

A. No. I got suspicious.

MR. LORENCE: That's all.

THE COURT: Mr. Lorence, we've heard enough. Haven't you?

MR. LORENCE: Yes, thank you.

THE COURT: Anything further?

MR. KELLETT: No, your Honor.

THE COURT: Thank you, Officer, very much. You may stand down.

Argument, Mr. Lorence?

MR. LORENCE: Your Honor, I am sure the Court has read my brief and memorandum. I stand on that.

THE COURT: Response?

MR. KELLETT: My response would be, your (21) Honor, that it is probable cause for a -- stopping someone is based on the circumstances as well as what the officer reasonably believes, and he has indicated what he believed. The courts of this state have indicated -- the trial courts may take notice of the fact of the, not only the circumstances but certainly

the area in which they occurred. Clairmont and Woodward, as the Court's very well aware, is a rather high crime area and Mr. Shabaz was not coming out of a supermarket with a bag, bag of groceries, and I think an officer with eleven years on the street knows pretty much whether -- and as he indicated he thought either narcotics or a gun, from his experience and from the Court's, I think, knowledge of Clairmont and Woodward would be a very reasonably assumption. And, in fact, it did turn out to be a gun and I don't think his actions were unreasonable. And I would ask the Court to deny the motion.

THE COURT: Rebuttal?

MR. LORENCE: Do I have to?

THE COURT: No.

MR. LORENCE: Thank you.

THE COURT: I want to thank Officer Surma for his testimony in this cause. I find him to be a totally credible witness. He has been in this court before and there (22) is no reason to question his veracity.

The problem with this case is, I believe is, that People vs. Terrell, 77 Mich Ap 676, I believe applies, and I believe Terrell to still be the law and it is extra-ordinary how this case comports with Terrell on its facts. In Terrell, although the intersection was different -- that was Fenkell and Dexter -- at that time also has a little bit of crime. Police Officer Michael Dwyer, 4 o'clock in the afternoon, was driving an unmarked scout car and he saw the Defendant

standing at the corner. As Officer Dwyer drove through the intersection, the Defendant reached into his pocket, ran on Dexter. Officer Dwyer testified at the hearing he believed it possibly to be a gun in his pocket, that's why he took the chase. The defendant ran into the apartment building and up the second floor, where the officer observed him pull his hand out of his pocket and drop a coin envelope containing a brown substance. The arrest was made, substance containing contraband.

The only difference between that case and this case is that there was a bag seen in this case versus the hand in the pocket in Terrell. I find that, under the circumstances here, to be a distinction without a difference. it's unfortunate in the sense we have

experienced police (23) officers who have to suffer with these rulings. But nevertheless, that they have to. The trial court suppressed the gun or narcotics in Terrell and dismissed the case. The case was appealed by the Wayne County Prosecutor's Office. The Court of Appeals held that trial court's determination to suppress was, quote, "soundly based on existing law, state and federal", close quote. They went on to cite Terry and additionally they stated at 679, quote, "A totality of facts and circumstances which could provide the officer with a reasonably belief that criminal activity may be afoot was simply lacking in the instant case. Defendant's furtive gestures may have aroused the police officers' general suspicion, but without some additional, specific knowledge on the part of the officer,

they were insufficient to justify an intrusion," close quote, citing Siveran vs. New York and a number of other cases, quote, "...nor is the officers' conduct justified under the hot pursuit exception to warrant clause," citing Worden vs. Hayden. The Court went on to say, quote, "It was not justified at its inception and was therefore unlawful, in violation of Defendant's 4th Amendment rights. The initial invasion being improper, the seizure of the coin envelope was unpermissible under the plain-view exception articulated in Coolidge, the seizure of evidence (24) cannot be justified," close quote.

So for those reasons stated, the motion to suppress is granted. The case is dismissed. I would note for the record that it is the Court's personal belief that this

is an unfortunate result, the Defendant having four prior concealed weapons convictions, a habitual information having been filed against him. But the Court is compelled to follow the law as it sees it, so be it.

That's all. Goodbye.

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(25)

STATE OF MICHIGAN) SS
COUNTY OF WAYNE)

CERTIFICATE OF COURT REPORTER

This is to certify that I, Carol A. Shell, did stenographically report the foregoing testimony and proceedings had in the above-entitled cause, as hereinbefore set forth, and that the annexed and foregoing typewritten transcript does constitute a true, full, and accurate report of such proceedings, and of my stenographic notes so taken.

/s/
Carol A. Shell,
Official Reporter